In the Supreme Court

OF THE

United States

OCTOBER TERM, 1943

Supreme Court, U. S.
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No. 723

(Consolidated Causes: California Supreme Court, L. A. No. 18,066)

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation),
Respondent.
(Superior Court No. 3783)

CITY OF LOS ANGELES (a municipal corporation), DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,
Petitioners,

vs.

NATURAL SODA PRODUCTS COMPANY (a corporation),
Respondent.
(Superior Court No. 3817)

BRIEF OF AMICUS CURIAE ON BEHALF OF IRRIGATION DISTRICT ASSOCIATION OF CALIFORNIA.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Irrigation District Association of California hereby requests leave to file this brief of amicus curiae on the hearing in this Court of the above entitled causes. This is the first time this association has appeared in these causes.

The matters involved here are of utmost importance not only to the one hundred and some odd irrigation districts in the State of California containing acreage running into the millions and with appropriation on every major stream with diversion works from single diversion canal and weir, similar to the works described in these causes, to multiple purpose reservoirs but to all appropriators not only of this State but to all states where the law of appropriations of water exists, for the effect of the decision of the Supreme Court of California is to legislate a new law which abrogates existing law as to the rights and duties of appropriators.

The effect of this new law obligates an appropriator of water in California to be responsible for water which he does not own, that is to all the water in a stream over and above his appropriative right. It places the burden on him of seeing that this water he does not own causes no one injury. If it does he is responsible in damages. This would be depriving him of property without due process of law.

The Supreme Court of California sought legal foundation for this new duty on the basis that the diversion works of the appropriator were permanent in character and therefore the canal had become the natural channel and the original channel below its weir had lost its character as a natural channel. Let it be pointed out here that in cases where an artificial channel by usage has become a natural channel, all the incidents of a natural channel also attach to-wit: lands bordering on such channel are riparian thereto. Would the lands bordering the aqueduct of the City of Los Angeles be said to be riparian thereto? The diversion works in the instant case are no different than the diversion works of hundreds of other appropriators.

An appropriator of water owns at a given time no more water than what he can put to a beneficial use. Water in excess of such use does not belong to him, he has no right to interfere with its natural flow down its stream bed and having *no right* thereto *no duty* attaches.

The following are excerpts from the Constitution and Water Code of California. The Water Code became law in 1943 and is a codification without change in substance of the existing law.

> "The right to water or to the use or flow of water in or from any natural stream or water course in this state is and *shall be limited to such water as shall be reasonably required for the beneficial use to be served,* and such right does not and shall not extend to the waste or unreason-

able use or unreasonable method of use or unreasonable method of diversion of water."

Article XIV, par. 3, Constitution of Cal.

The above section was first applied in *Gin S. Chow v. Santa Barbara,* 217 Cal. 673 [22 P. (2d) 5]. It was carefully analyzed and applied in *Peabody v. City of Vallejo,* 2 Cal. (2d) 351 [40 P. (2d) 486], where the Court said:

"The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. Epitomized, the amendment declares:

1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.

2. Such right does not extend to the waste of water.

3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water under whatever right the use may be enjoyed."

The Water Code provides as follows:

"All water within the State is the property of the people of the State, but the right to the

use of water may be acquired by appropriation in the manner provided by law."

Section 102, Water Code of California.

"The following are hereby declared to constitute unappropriated water:

(a) All water which has never been appropriated;

(b) All water appropriated prior to December 19, 1914, which has not been in process, from the date of the initial act of appropriation, of being put, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation, or which has not been put or which has ceased to be put to some useful or beneficial purpose;

(c) All water appropriated pursuant to the Water Commission Act or this code which has ceased to be put to the useful or beneficial purpose for which it was appropriated, or which has been or may be or may have been appropriated and is not or has not been in the process of being put, from the date of the initial act of appropriation, to the useful or beneficial purpose for which it was appropriated, with due diligence in proportion to the magnitude of the work necessary properly to utilize it for the purpose of the appropriation;

(d) Water which having been appropriated or used flows back into a stream, lake or other body of water."

Section 1202, Water Code of California.

Therefore an appropriator only owns at a given time the right to use the water in a stream to the extent of the beneficial use, and water in the stream in excess of the use is owned by the State.

The effect of the new law is to make an appropriator custodian of and responsible for all the water in a stream in excess of that which at a given time he may use whether the title thereto is in the State or another user thereof. This fact makes it a federal question as constituting a right reserved in the Constitutions, Federal and State. There is just as much right in applying such doctrine to an appropriator of water as there would be in applying such doctrine to a rancher who, having caged a lion, is made responsible for the depredations of all the lions left on the range, or because a person owns an automobile to make him responsible for the damage caused by automobiles owned by others.

To let this decision stand in the case law of California is an open invitation to every occupier of a downstream channel to sue an upper appropriator for any damages he may suffer from the water flowing in the stream.

The Supreme Court of the United States is the last resort of a citizen of the United States whose constitutional rights have been invaded. We say that the constitutional rights of all appropriators of water have been invaded by this fiat of the Supreme Court of the State of California.

It cannot be said that the decision is isolated and only affects the rights and duties of the appropriator

in the instant causes. We are confined to the four corners of that decision and the language therein is so indefinite, so general, that it is open to the widest interpretation and application. For example, in the opening paragraph the Court states:

> "In 1913, the defendant City of Los Angeles completed its aqueduct to the Owens River Valley and, from 1919 to 1937, diverted into it *virtually all the flow of the* Owens River, * * *"

It does not say all the flow but part of the flow. How much of a flow must continue down a natural channel to keep such channel natural? Must it exist every year even in years of drought when all the flow is absorbed by some of the prior appropriators on a stream?

The effect of the decision is to create a new law, which law is in contravention of the Constitution in that it takes property without due process.

Dated, Fresno, California,
April 12, 1944.

Respectfully submitted,
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